

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 1:17cr130

vs.

DANIEL GISSANTANER,

Defendant.

Before:

THE HONORABLE JANET NEFF,  
U.S. District Judge  
Grand Rapids, Michigan  
Thursday, March 22, 2018  
Motion Proceedings

APPEARANCES:

MR. ANDREW BIRGE, U.S. ATTORNEY  
By: MR. JUSTIN PRESANT  
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On behalf of the Plaintiff;

FEDERAL PUBLIC DEFENDERS  
By: MS. JOANNA CHRISTINE KLOET  
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On behalf of the Defendant.

REPORTED BY: MS. KATHY J. ANDERSON, RPR, FCRR

March 22, 2018

PROCEEDINGS, 10:07 a.m.

THE LAW CLERK: All rise, please. Court is now in session. Please be seated.

THE COURT: Good morning, everybody.

MS. KLOET: Good morning.

THE COURT: I have had more mouse problems today. This is the date and time that is set for hearing on a couple of government motions in case number 1:17cr130, the United States of America versus Daniel, is it Gissantaner. Gissantaner. How is it properly pronounced?

MS. KLOET: Gissantaner, Your Honor.

THE COURT: Counsel, would you please put your appearances on the record for me and any introductions of people who are at counsel table.

MR. PRESANT: Good morning, Your Honor. Justin Presant for the United States. With me at counsel table this morning is ATF Special Agent Jeff Kitchen.

THE COURT: Kitchen.

MR. PRESANT: Kitchen, Your Honor.

THE COURT: Spelled the normal way?

MR. PRESANT: It is, Your Honor.

THE COURT: Thank you.

MS. KLOET: Good morning, Your Honor. Joanna Kloet, Assistant Public Defender, and to my left is Pedro Celis our

1 research and writing specialist attorney, and to his left is  
2 Mr. Gissantaner.

3 THE COURT: Great. In addition to the hearing on the  
4 motions this morning, there are a couple of housekeeping things  
5 we need to talk about, but I think we will defer those until  
6 I've decided the motions after argument.

7 There is one I do have a question on before we get  
8 started.

9 There's a reference somewhere in the defendant's  
10 documents to this being a second, it sounded like it was a  
11 second trial. But is it accurate to say that what you were  
12 referencing was an MDOC proceeding?

13 MS. KLOET: That is accurate, Your Honor.

14 THE COURT: Okay.

15 MS. KLOET: There was a hearing, a merits hearing at  
16 the MDOC.

17 THE COURT: And the result was?

18 MS. KLOET: He was acquitted on the charge of felon in  
19 possession.

20 THE COURT: Based on?

21 MS. KLOET: Based on the evidence that was presented  
22 in that hearing which did not include the DNA evidence and  
23 likelihood ratio that is at issue in these motions.

24 THE COURT: Okay. Great. All right. We are first  
25 going to take up the government's motion to quash the defense

1 subpoenas which were served on I believe two federal employees  
2 who are employed by the National Institute of Standards and  
3 Technology. So, Mr. Presant, you're up.

4 MR. PRESANT: Thank you, Your Honor. The government's  
5 motions are or the government's arguments I should say are set  
6 forth in the motion that it filed on the issue. I'll briefly  
7 summarize those arguments and then take any questions that the  
8 Court has of course.

9 The basis for the motion to quash really are federal  
10 regulations that have been approved of by the Supreme Court, or  
11 at least the general class of regulations, if not the  
12 regulation itself at issue in this case, has been approved by  
13 the United States Supreme Court in United States ex rel. Touhy  
14 versus Ragen, 340 U.S. 462, and that's a 1951 case out of the  
15 Supreme Court.

16 And the rationale behind the Touhy regulations of  
17 course is that the government has an interest in conserving its  
18 resources. The resources being the time of federal employees  
19 whose job it is not to be professional expert witnesses.

20 THE COURT: The government also has an interest,  
21 Mr. Presant, in not convicting people on insufficient evidence.  
22 And so when it comes down to balancing the government interest  
23 in preserving resources, and the defendant's right to be tried  
24 on proper evidence, resources loses.

25 MR. PRESANT: I agree with that general concept, Your

1 Honor, with some caveats. One caveat being the type of witness  
2 at issue here. These are witnesses who the defendant wants to  
3 call as opinion witnesses and not fact witnesses.

4 THE COURT: Well, that's not quite accurate. As I  
5 understand it, and as I understand what the precedent provides,  
6 is that while they may not be properly asked for opinion  
7 testimony, they can be properly queried with regard to  
8 conclusions that they have reached from their research.

9 And it just seems to me that -- I really do think,  
10 I'll tell you honestly, before this case I had never heard of  
11 the Touhy regulations. So we had to do a lot of digging. And  
12 it's pretty clear that the law in this particular area is not  
13 black and white, as it were. And what I understand, and  
14 certainly Ms. Kloet can speak for herself, but my understanding  
15 is not that they are looking for opinion testimony on the  
16 particular facts of this case or the particular DNA of this  
17 case, but their expertise which apparently is considerable on  
18 this relatively new, and again based on our research,  
19 relatively untested in the courts form of DNA testing.

20 So go from there, if you would.

21 MR. PRESANT: Thank you, Your Honor. I appreciate the  
22 opportunity to address that.

23 So as an initial matter, Drs. Lund and Iyer, I believe  
24 they are doctors though I haven't seen their C.V.s, I assume  
25 they are given their expertise, I understand them to be experts

1 in statistics, not in DNA analysis, not in probabilistic  
2 genotyping.

3 THE COURT: But probabilistic genotyping comes up with  
4 a statistical number, right?

5 MR. PRESANT: It does. And so what their paper says,  
6 to the extent I can understand it, and it is, it's a very dense  
7 paper, I have read things about that paper that say you need to  
8 have a background and expertise in statistics to even  
9 understand what they're saying. So I think I have some grasp  
10 of what they are trying to say in their paper.

11 And based on my understanding of that paper, what it's  
12 really about is how likelihood ratios can be used in the  
13 courtroom as applied to all forensic discipline. So, yes,  
14 STRmix and probabilistic genotyping end in a likelihood ratio,  
15 as do other forms of forensic evidence that are presented in  
16 court, including in paternity testing, paternity forensic DNA  
17 analysis results in likelihood ratio, and there's been a  
18 proposal to adopt likelihood ratios in other forensic  
19 disciplines where they are not being used where they could be  
20 used. And there are some good arguments for doing that, and I  
21 think what their paper is really about is urging caution in  
22 wide spread adoption of likelihood ratios because of what are  
23 really abstract statistical concerns about that.

24 However, I think Drs. Lund and Iyer also acknowledge  
25 that likelihood ratios are appropriate in some applications in

1 court. And if there's any application that likelihood ratios  
2 are appropriate in, it's in DNA forensic analysis.

3 THE COURT: Well, and that, you know, what you have  
4 just described, Mr. Presant, really seems to me to argue for  
5 bringing them in to explain that all to me. It really does.  
6 Because I have to tell you that I took one statistics class in  
7 undergraduate school about a hundred years ago, and I hated  
8 every minute of it. But it just seems to me that this area,  
9 and I've done some reading, I didn't look very closely at the  
10 exhibits -- we are going to have to talk about that later --  
11 but it just seems to me that where you have the kind of  
12 situation that faces us here, as I said earlier, a relatively  
13 new, relatively untested in the courts scientific testing  
14 regimen, and lay people, a lay person, this judge, who has to  
15 make a decision whether it is admissible or not admissible,  
16 that as much information as is available, as much expertise  
17 that we can call on argues for bringing these people forward.

18 And, again, based on our review of the legal landscape  
19 with regard to the Touhy issue, I don't see any impediment to  
20 me ordering them to come. Affidavit or no affidavit.

21 MR. PRESANT: Your Honor, I would like to address the  
22 legal issue, but if I may, in preparing for today's hearing I  
23 also came across just a two-page relatively short question and  
24 answer type article from "IDentification News." It's written  
25 by John Paul Jones who interviews the two authors about

1       likelihood ratios. And to me it made their opinions much more  
2       accessible and I think it will shed some light on the issue for  
3       the Court. And I provided a copy to defense counsel. So I'll  
4       hand that up to the Court now.

5               THE COURT: Sure.

6               MR. PRESANT: And I just like to direct the Court to I  
7       think what is ultimately the main issue here which is on the  
8       back side of the question and answer. And the second to last  
9       question that they're asked in this article is, "Do you feel  
10      that LR, likelihood ratios, should not be used in courtroom  
11      testimony?" And they say: "No, that is not our view. While we  
12      do not consider it proven that likelihood ratios are the final  
13      answer and recognize their limitations, they may be the best  
14      communication strategy currently available in many forensic  
15      applications if one accepts the idea that the role of the  
16      expert is to effectively summarize the relevant information in  
17      the form of a 'weight of evidence'." And --

18              THE COURT: Again, that just seems to scream, let me  
19      hear from these people.

20              MR. PRESANT: Well, I understand that, Your Honor,  
21      that we certainly, we certainly could bring them here, or the  
22      defense could bring them here, if the Court lets the motion, or  
23      the subpoena stand. But I think the question is what's the  
24      limiting principle on that? I understand this is just one  
25      case. And they could be brought here, and maybe some other



1 judge in some other case down the line can see what the actual  
2 burden is on this. But I submit to the Court that the  
3 rationale behind the Touhy regulations has to have some effect  
4 in terms of weighing the government's interests and having  
5 experts fly across the country here, they could fly across the  
6 country in every case in which likelihood ratios are used,  
7 every paternity lawsuit, every instance in which DNA evidence  
8 is presented in the form of likelihood ratios. And if all they  
9 are going to come and say is, well, we should be cautious in  
10 adopting likelihood ratios in other forensic disciplines but  
11 likelihood ratios may be the best thing that are currently  
12 available to communicate the conclusions of forensic analysis  
13 in court, that is a burden on scientists whose job it is to  
14 conduct research like that submitted by the defendant for a  
15 relatively marginal benefit.

16 The government has no issue with the Court considering  
17 their paper, has no issue with the Court considering their  
18 statements in other articles.

19 THE COURT: Well, you've already said that the paper  
20 is very dense, and I take you at your word. And I am not ready  
21 to accept, what is this, maybe a hundred words in this  
22 paragraph as the be all and end all. It just seems to me, and,  
23 you know, the argument that the slippery slope and all that  
24 sort of stuff, that argument is made so many times. If this  
25 technology is as good as the government believes it is, it will

1 eventually, maybe after this case and another case, and a third  
2 case, it will gain the kind of acceptance that other kinds of  
3 forensic evidence have such as, fingerprints; I mean nobody  
4 questions, although I guess now some people are beginning to,  
5 but nobody has questioned fingerprint evidence for probably  
6 50 years. But early on, I'm guessing, there were some smart  
7 lawyers who did.

8 And so if it does, if it is as good as you think it  
9 is, sooner or later, and it may cause some inconvenience to the  
10 government, and maybe will cause a little bit of expense,  
11 sooner or later, it will get there. And whenever the  
12 government provides this evidence with the proper foundation,  
13 there won't be any question. The defendants will stipulate to  
14 it, just as they stipulate to other kinds of scientific  
15 testing. I'm thinking of breathalyzer tests, same thing. You  
16 know, when I was early in practice they were relatively new and  
17 there were challenges to them. Some successful. And now, you  
18 know, if you can show that the operator made sure that the air  
19 passage was clear, made sure that the defendant didn't have  
20 anything in his mouth and all of that, the results are not  
21 challenged in court.

22 And, again, you know, as I said, I think if that is  
23 your strongest argument, it's not a strong argument at all.

24 MR. PRESANT: And I just want to make sure that the  
25 record is clear. The Court understands that these experts if

1 they are called will not testify about STRmix or probabilistic  
2 genotyping typing, they are strictly, my understanding is, they  
3 are going to testify about likelihood ratios and Bayesian  
4 decision theory and the effect of that -- the effect or how  
5 those statistics can be presented in court. So they aren't  
6 going to testify about the technology. They haven't studied  
7 the technology. They don't understand the technology. Though  
8 I haven't talked to them. I could be wrong about that. But  
9 that's my understanding based on everything that's been  
10 submitted in the case. They're just going to talk about the  
11 numbers, and so I don't think they will have anything to say  
12 about STRmix or probabilistic genotyping.

13 THE COURT: Well, let's hear from Ms. Kloet. She  
14 might be able to enlighten us.

15 MR. PRESANT: Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Presant.

17 MS. KLOET: Your Honor, I'm happy to address the Court  
18 on the substance of what their testimony would be. To the  
19 extent to which the Court wants to address Touhy regulations,  
20 Mr. Celis prepared that response and he is prepared.

21 THE COURT: Okay.

22 MS. KLOET: I think the Court has stated it well to  
23 the -- I intend to have Iyer and Lund come here to explain  
24 their findings as fact witnesses. To do that they're going to  
25 have to explain some really high level statistical concepts

1       like Bayesian decision making theory and how that applies to  
2       its use in probabilistic genotyping systems. I mean they are  
3       not creators of probabilistic genotyping systems but because  
4       that type of system generates a likelihood ratio, they may have  
5       to testify regarding how that, how those statistical principles  
6       apply in the context of PGS.

7               I think they are necessary because I mean, Your Honor,  
8       as a non scientist, non mathematician, this article was  
9       inscrutable. It took me weeks, months to get through it and  
10      just to emerge with some sort of rudimentary understanding of  
11      what the gist of what they are saying is.

12             I have had an opportunity to communicate with them.  
13      And I do believe their testimony will be very helpful to the  
14      Court in understanding the underlying principles, how it  
15      applies to especially complex mixtures that are at issue in  
16      this particular case.

17             THE COURT: Well, again, after listening to  
18      Mr. Presant, I am more convinced that you're correct, and as to  
19      the question of the necessity, whether they are necessary, I  
20      think that is really more a judgment for defense counsel to  
21      make than for me to make, or Mr. Presant.

22             If, you know, in evaluating your defense of  
23      Mr. Gissantaner, if it is your professional judgment that this  
24      testimony is necessary for your proper preparation and  
25      presentation, then I think that Mr. Presant's argument to the

1 contrary really is essentially irrelevant, honestly. You know,  
2 it's not a relevance argument. It's an argument we don't need  
3 this testimony, and the defense thinks it is necessary.

4 So to that extent, I think I get your argument. I  
5 agree with it.

6 If Mr. Celis wants to put some brief argument on the  
7 record with regard to the Touhy regulations, I think I can then  
8 make a --

9 MR. CELIS: Your Honor, I don't think that's necessary  
10 in this case. I will think we can stand on the arguments we  
11 made in our response as they relate to the Touhy regulations.

12 THE COURT: Okay. Thank you. I'm not even going to  
13 cite any case law. As I said, I think that the case law --  
14 well maybe I should in deciding the motion.

15 First of all, the question of procedural compliance  
16 with the agency's regulations, where the agency hasn't even  
17 said that they believe their regulations have been violated,  
18 the agency itself hasn't raised this issue; we don't know what  
19 the agency thinks. I assume that Mr. Presant has been in  
20 contact with the NIST counsel or somebody that is related to  
21 the National Institute of Standards and Technology, but we  
22 don't even know if they have a position on whether the Touhy,  
23 or whether the, their regulations have been offended in any way  
24 by the defendant, and the defendant argues I think fairly  
25 persuasively that they haven't. Mr. Presant.

1 MR. PRESANT: May I address that, Your Honor?

2 THE COURT: Sure.

3 MR. PRESANT: So the subpoenas were brought to my  
4 attention because NIST counsel turned them over to me. This is  
5 my first encounter with Touhy as well. But my understanding is  
6 it's a routine matter when agency employees are subpoenaed for  
7 them to turn it over to their counsel who then contacts the  
8 relevant U.S. Attorney's office to file the motion to quash.

9 THE COURT: Okay.

10 MR. PRESANT: So the motion to quash was filed at the  
11 request of agency's counsel.

12 THE COURT: Got you. Okay. Thank you. So now that  
13 is cleared up. We do have some basis to believe that the  
14 agency does not -- wishes to quash these, these subpoenas.

15 But in, again, the case law, and I'm looking for the  
16 full cite, the case law says, and this is not exactly a quote,  
17 but, and we couldn't find anything directly on point, but the  
18 case law essentially says, that a federal agency's Touhy  
19 regulations do not control a federal court's evidentiary  
20 decisions including the issuance of subpoenas for testimony of  
21 a federal employee in cases in which the United States is a  
22 party. And that's 93 -- what is that cite, Kathie -- Federal  
23 Claims at 380. And further, where such regulations are clearly  
24 in conflict with the Court's authority as set forth in the  
25 Federal Rules of Evidence and the rules of court, they can have

1 no force or effect. And for that I would cite Romero versus  
2 the United States, 153 Federal Rules decision, 649, U.S. v  
3 Henson, 123 F.3d 1226, disapproved on other grounds in U.S.  
4 versus Foster, 165 F.3d, 689, U.S. ex rel. O'Keefe versus  
5 McDonnell Douglas Corporation, 132 F.3d 1252.

6 And then the Supreme Court has said they looked at the  
7 Housekeeping statute and held it does not provide statutory  
8 authority for substantive regulations, Upsher-Smith Labs versus  
9 Fifth Third Bank, the 16cv556, the Westlaw cite is 2017  
10 WL7369881.

11 So the bottom line is that the motion to quash is  
12 properly decided by this Court under the Rules of Evidence and  
13 the court rules that are applicable. And I believe that the  
14 testimony which the defendant wishes to bring forward has a  
15 high likelihood of being relevant, and even more significantly,  
16 of doing what expert testimony is supposed to do, and that is  
17 educating the Court. I think that all of us, all of us lawyers  
18 in this matter come to this issue, this DNA issue, I can't even  
19 remember what, SXT --

20 THE LAW CLERK: STR.

21 THE COURT: -- from a decided disadvantage. I'm sure  
22 not a scientist, and I need to understand this stuff before I  
23 can make an informed decision. And so the more help I can get,  
24 the better off we will all be.

25 So the government's motion to quash is denied.

1           The other thing I would say, and I don't know whether  
2           it was the defense pointed this out or whether it was  
3           Ms. Geiger, my law clerk, but in doing some reading on this  
4           stuff, it's pretty clear that there's a lot of research still  
5           going on and it may well be that these two authors will have  
6           something that has come to them, or that their work has  
7           discovered since they wrote the paper. And, again, if that's  
8           the case, boy, I would love to know it. I really would.

9           So the motion to quash is respectfully denied.

10          All right. Now, the next motion we have before us is  
11          the government's motion to exclude the defense witness Nathan  
12          Adams. Or to delay the Daubert hearing. That latter I think  
13          is pretty much moot. And I think I pretty much understand your  
14          argument, Mr. Presant. It's a fairly technical one. I think  
15          you would agree. But if you want to put something on the  
16          record, please do so now.

17          MR. PRESANT: I'll be brief, Your Honor. And I agree  
18          that given the rescheduling of the hearing anyway, the  
19          alternative form of relief may be moot.

20          The issue really is just to make sure that whatever  
21          challenges the defendant is bringing in the Daubert motion are  
22          joined.

23          I reviewed very carefully the motion that was filed  
24          back in December, and Ms. Kloet provided contemporaneous or  
25          near contemporaneous disclosure of one expert, Dr. Julie



1       Howenstine, and I think Ms. Kloet and I have had a lot of  
2       conversations about the anticipated expert testimony for the  
3       Daubert hearing in the time since that initial disclosure. And  
4       so I think that the government has therefore prepared its  
5       experts to respond in part to some of the opinions that it  
6       believes Dr. Howenstine is going to offer at the Daubert  
7       hearing.

8               I think the disclosure with respect to Mr. Adams which  
9       happened on March 12th of this year, some nearly three months  
10      after the initial motion was filed along with the initial  
11      disclosure of Dr. Howenstine, are different in kind from the  
12      types of arguments raised in that motion. I understand  
13      Mr. Adams's arguments are going to be directed more towards the  
14      software engineering and the computer coding behind STRmix as  
15      opposed to what is probabilistic genotyping, what is STRmix,  
16      how does it work, how is that evidence then presented in court,  
17      what are the biological and chemical processes that lead  
18      ultimately to the likelihood ratio that's presented in court.  
19      Those are all the things the government was prepared to present  
20      evidence on, whereas Mr. Adams is really talking about coding.  
21      And from the very little time that I have had to -- well, so,  
22      just to finish that thought and tie it off. The government if  
23      that's what's going to be at issue in this motion just wants to  
24      be able to respond appropriately.

25               THE COURT: Is the government also expecting or

1       contemplating hiring its own expert on the coding issue, on the  
2       software issue?

3               MR. PRESANT: Well, I want to review the issue. I  
4       mean I have taken a very cursory look so far at Mr. Adams's  
5       qualifications, and the opinions he might be qualified to  
6       render, and there are some things that are concerning to the  
7       government about whether he really is qualified to offer the  
8       opinions that he's been tendered for. I haven't had enough  
9       time to review that sufficiently where I feel confident in  
10      taking a position one way or the other, but it may be that the  
11      appropriate action for the government to take is to move to  
12      exclude him because of his lack of qualifications or expertise  
13      to render an opinion on that issue. It may be the appropriate  
14      course of action is for the government to hire its own expert  
15      to respond to those issues, or it may be that even if the Court  
16      is going to receive his opinion based on what qualifications he  
17      has, that cross-examination would be sufficient in order for  
18      the government to meet its burden under Daubert. But the  
19      government just wants additional time to review those options  
20      to make sure that the issue is joined.

21             THE COURT: How much time do you think you would need?

22             MR. PRESANT: In our motion we ask for 45 days from  
23      today's hearing. And really I wouldn't ask for that much time  
24      ordinarily but it is highly technical.

25             THE COURT: I don't think that's a lot of time, to be

1 honest with you. You know, I think that's a very reasonable  
2 position in terms of timing.

3 Have you done a calculation of how much time is left  
4 on the speedy trial clock?

5 MR. PRESANT: I don't believe we have speedy trial  
6 issues in this case, Your Honor, because the pending motions  
7 tolled the Speedy Trial Act. I would be interested to hear  
8 Ms. Kloet's position on that issue. But, no, I haven't done  
9 that calculation. But I think because of the motions for ends  
10 of justice that were filed by Ms. Kloet in preparing the  
11 original Daubert motion, and then the fact that that motion has  
12 been pending, the two motions before the Court have been  
13 pending, I think all of that time would be excluded under the  
14 Speedy Trial Act.

15 THE COURT: It might behoove you to try to figure that  
16 out anyway.

17 MR. PRESANT: I will certainly will look into it. And  
18 the only other issue I'll add on this if the Court is inclined  
19 to delay the hearing, the two experts the government was  
20 planning to call at today's hearing they are both with the  
21 Michigan State Police, Dr. Jeffrey Nye who is a member of  
22 SWGDAM is SWGDAM, which is the national governing body for --  
23 which stands for the Scientific Working Group on DNA Analysis  
24 Methods. I know. It's a world of acronyms we are living in  
25 now between STRmix and SWGDAM. And I'll stop saying them for

1 the benefit of the stenographer. But our two experts were  
2 holding this date, and they have some things on their calendar  
3 that they asked me to make the Court aware of. And I can get  
4 in touch with your case manager if we are trying to find a new  
5 date because I would like to do whatever we can to accommodate  
6 their schedules.

7 THE COURT: I understand. And I agree. And Rick will  
8 work with you in finding another date.

9 MR. PRESANT: Thank you, Your Honor, I appreciate it.

10 THE COURT: Okay. Ms. Kloet. You want to respond?

11 MS. KLOET: Sure. Briefly, Your Honor. I just wanted  
12 to underscore the importance of Mr. Adams's testimony for the  
13 Court.

14 The science or technology in front of the Court  
15 really, at the risk of oversimplification can be distilled into  
16 three separate areas of expertise and that is DNA forensic  
17 analysis, statistics, and software.

18 Mr. Adams, his testimony would be largely about the  
19 fact that there are well-established standards for testing and  
20 developing software and they were not met here. They have been  
21 applied to Smart phone apps, airline navigator systems, they  
22 have been established for decades, and they were not met here.

23 His testimony will supplement Dr. Howenstine's  
24 testimony as to the forensic DNA forensic testing, and also the  
25 testimony of Drs. Lund and Iyer with respect to the

1 statistical --

2 THE COURT: You don't disagree, do you, that the  
3 government should have an ample opportunity to do the three  
4 things that Mr. Presant just talked about, review Mr. Adams's  
5 qualifications, decide whether to challenge him on his  
6 qualifications, decide whether cross-examination is going to be  
7 sufficient, and decide whether to call their own expert. You  
8 don't disagree with any of that, do you?

9 MS. KLOET: No, Your Honor. I think both parties need  
10 time to do that, absolutely.

11 THE COURT: All right. Anything further?

12 MS. KLOET: No, Your Honor. Just that what  
13 Mr. Presant said about me keeping him apprised in real time as  
14 I was searching for an expert is accurate. Thank you.

15 THE COURT: All right. The, under Rule 16, as I'm  
16 sure the parties know or counsel knows, I've got pretty broad  
17 remedial powers in regulating discovery. And I think that to  
18 some extent we can excuse the defense's lapse, I think there  
19 was a lapse here, but for -- because this case is a fairly  
20 complicated one, and one involving an evidentiary issue that  
21 none of us is really all that familiar with, I think we can  
22 exclude the possibility of a dismissal as a result of any  
23 potential violation of the court rules in naming an expert and  
24 so forth.

25 In addition to that, the stakes in this case are very

1 high. Mr. Gissantaner is facing a charge which carries a  
2 mandatory 15-year minimum sentence. And that's, that's a big  
3 deal. It's a big deal to me. I'm quite sure it's a big deal  
4 to him, and I think it's probably a big deal to the government  
5 too. And so I don't think it is at all off the mark to say  
6 that Mr. Adams should be allowed to testify as an expert  
7 subject to the Daubert hearing, of course, and without any  
8 sanctions of any kind. I just think that we are all grappling  
9 with a situation that is not familiar to any of us, and we are  
10 doing the best we can.

11 So for purposes of the ruling on the motion, the  
12 motion to exclude the defense witness is, well, it's granted in  
13 part and denied in part. It's granted to the extent that we  
14 are going to reschedule the Daubert hearing. It's denied in  
15 terms of the motion to exclude Adams as a witness.

16 Counsel will confer with the Court's case manager to  
17 find a new date for the Daubert hearing.

18 I want to go back just one second to the ruling on the  
19 motion to quash. Not only are the Touhy regulations an area of  
20 novelty for all of us, it really seems to me, and I haven't  
21 obviously read all the cases, but it really seems to me that  
22 for the most part the case law that has dealt with them has  
23 been on the civil side of the courtroom. And we're dealing  
24 with different priorities on the criminal side. And I think  
25 that argues even more strongly for the Court to have

1 discretion. I don't think, I don't think I need any more  
2 authority for that proposition. But to the extent that it  
3 simply bolsters my conclusion, I offer that for the record for  
4 whatever it's worth.

5 Now, housekeeping. Kathie, do you have those binders  
6 there? Ms. Kloet provided the Court with a gigantic stack of  
7 loose exhibits. My JA was nice enough to hole punch them and  
8 put them into binders. I'm going to give those binders back to  
9 Ms. Kloet with the instructions that she is to, number one,  
10 prepare an index which not only identifies the exhibit but  
11 gives at least a brief description of what it is and what it's  
12 relevant to. And secondly, that she tabs each one. It would  
13 be nice to have a divider, a tab divider between each exhibit.

14 Was there anything else, Kathie, that I needed to  
15 address this morning?

16 THE LAW CLERK: We are all set on the speedy trial.

17 THE COURT: Yeah, they're going to deal with Rick and  
18 they will figure it out.

19 THE LAW CLERK: But we do need to hear from the  
20 defense?

21 THE COURT: Maybe we do. That's a good idea.  
22 Mr. Gissantaner, you have sat through this and I know that you  
23 were not particularly interested in any further delays. And I  
24 understand that. But my question to you is even --  
25 Mr. Presant may well be correct that the speedy trial clock is

1 not running, but do you have any objection to us putting this  
2 case out further into the schedule to allow everybody,  
3 including me, to really get up to speed and understand the  
4 nature of the evidence that the government wants to present  
5 against you? Do you have any objection to the delay that is  
6 going to probably be, I'm guessing more than 45 days, partly  
7 because my schedule in May and April is just jammed.

8 So can you tell me what your thinking is on the delay?

9 THE DEFENDANT: No, ma'am, Your Honor. In the  
10 interests of fundamental fairness, I think he deserves the  
11 right to prepare anything he deems necessary. And I think the  
12 Court should have the right to explore and make a decision  
13 based on that. I just want to be treated fairly.

14 THE COURT: Well, that's my goal too.

15 THE DEFENDANT: That's it.

16 THE COURT: Okay. Thank you, I appreciate your  
17 comments, Mr. Gissantaner.

18 What else, Kathie, anything?

19 THE LAW CLERK: No, I believe that's it.

20 THE COURT: Mr. Presant, anything further?

21 MR. PRESANT: No, thank you, Your Honor.

22 THE COURT: Ms. Kloet.

23 MS. KLOET: No, Your Honor. Thank you.

24 THE COURT: Okay. Thank you both. Thank you all.

25 And we are adjourned for today.



1 THE LAW CLERK: All rise. Court is adjourned.

2 (Proceedings concluded, 10:50 a.m.)

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## REPORTER'S CERTIFICATE

I, Kathy J. Anderson, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

U.S. District Court Reporter

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